Wasal Construction Sdn Bhd v Boh Huat Chan Timber Products Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-317–02 OF 2013
MOHD HISHAMUDIN, ABDUL AZIZ ABDUL RAHIM AND MOHAMAD ARIFF JJCA
25 JUNE 2013

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Civil Procedure — Appeal — Interference by appellate court — Whether to interfere with finding of fact based on credibility of witnesses — Whether to interfere with finding of fact based on inference drawn from other facts — No proper judicial appreciation of evidence by judge — Whether appellate interference warranted

D

Contract — Breach — Damages — Proof of — Plaintiff claiming amounts outstanding on six invoices — Failure to account for amounts paid by defendant — Failure to specifically state value of goods supplied — Mere production of statement of account without transaction or invoice details — Failure to explain discrepancy in figure claimed

E

The plaintiff claimed a sum of RM383,557.27 from the defendant as the balance owing from the sale of timber products (inclusive of late interest) which was sold and delivered by the plaintiff to the defendant. The plaintiff stated that the principal sum outstanding was RM146,522.77 based on six invoices. The defendant denied the amount owing and pleaded that the defendant had paid the plaintiff and as such there was no amount due and owing. The plaintiff in their pleadings never stated the total value of goods supplied to the defendant and the plaintiff never pleaded the payments made by the defendant. The plaintiff only pleaded that there were monies owing on six invoices issued within the period of 5 Mac 2002–24 May 2002 which amounted to RM146,522.77. The trial judge allowed the plaintiff's claim. The defendant appealed against that decision on the grounds that the plaintiff never produced any cogent and credible evidence that in spite of payments made there was an amount outstanding of RM146,522.77.

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Held, allowing the appeal with costs:

I

(1) It was uncontroverted fact that between the period of 12 January 2001 until 2010, the defendant had made payment to the plaintiff totaling RM1,380,160.97. However the plaintiff's witness ('SP2') did not cross-refer to any particular invoice in respect of each of the payment

made. She neither referred in her evidence to all the invoices that were issued by the plaintiff to the defendant nor did she testify as to the total amount invoiced from the invoices issued to the defendant. It was incumbent on the plaintiff to show all the invoices that were issued to the defendant for the period in questions, not merely the six invoices that were pleaded in the statement of claim; and also to show the total amount invoiced and the balance outstanding after taking into consideration the payments made by the defendant (see para 21).

(2) SP2's evidence as to the amount alleged still owing to the plaintiff by the defendant was based on a one-page document which was said to be the statement of account issued by the plaintiff to the defendant. There was no transaction details or invoice details. The maker was not called to explain how the sum of RM146,552.77 was arrived at and that the statement of account was also not signed (see para 23).

(3) The plaintiff's statement of claim had prayed for the sum of RM383,557.27 as the amount owing by the defendant as of 31 July 2011. This figure comprised of the principal sum of RM146,552.77 and late payment interest totaling RM237,034.50. However at para 8 of the statement of claim, with regard to the calculation of late payment interest, it was stated that the principal sum outstanding was RM139,196.63 not RM146,552.77. In the circumstances, a proper explanation by the maker of the statement of account as to how the figure RM146,552.77 was obtained was of great importance and relevance. Unfortunately there was no such evidence (see para 23).

(4) In exercising its judicial discretion to interfere with the finding of fact by a trial court, the appellate court draws the distinction between a case where the finding of a specific fact depends upon the credibility of witnesses and one which depends upon inference drawn from other facts. The appellate court would readily interfere in the latter case and form its own opinion on those facts than in the case of the former (see para 28).

(5) A proper judicial appreciation of evidence would mean that the trial judge had considered every piece of material evidence adduced before him or her and had tested the evidence against contemporaneous documentary evidence supporting the oral evidence of the witnesses and gave reasons for accepting or rejecting them (see para 31).

(6) The learned judge had based his findings almost wholly on the evidence of SP2. However, he had not given any reasons as to why he preferred the evidence of the plaintiff (in particular that of SP2) to the evidence of the defendant. The learned judge did not make any finding as to the credibility of DW1 or that DW1 was not a truthful witness or unreliable.

Therefore, the findings by the learned judge was unsatisfactory as there has been no proper judicial appreciation of evidence by him as the trier of facts (see para 32).

[Bahasa Malaysia summary

Plaintif telah menuntut sejumlah RM383,557.27 daripada defendan sebagai baki terhutang daripada jualan produk-produk kayu balak (termasuk faedah lewat) yang telah dijual dan dihantar oleh plaintif kepada defendan. Plaintif menyatakan bahawa baki jumlah utama adalah RM146,522.77 berdasarkan enam invois. Defendan menafikan jumlah terhutang itu dan mempli bahawa defendan telah membayar kepada plaintif dan oleh itu tiada jumlah yang perlu dibayar dan terhutang. Plaintif dalam pliding-pliding mereka tidak pernah menyatakan nilai keseluruhan barangan yang dibekal kepada defendan dan plaintif tidak pernah mempli bayaran-bayaran yang dibuat oleh defendan. Plaintif hanya mempli bahawa terdapat wang yang terhutang berdasarkan enam invois yang dikeluarkan dalam tempoh dari 5 Mac 2002–24 Mei 2002 yang berjumlah RM146,522.77. Mahkamah perbicaraan membenarkan tuntutan plaintif. Defendan merayu terhadap keputusan tersebut atas alasan bahawa plaintif tidak pernah mengemukakan apa-apa keterangan yang meyakinkan dan boleh dipercayai bahawa meskipun bayaran-bayaran telah dibuat masih terdapat baki sejumlah RM146,522.77.

Diputuskan, membenarkan rayuan dengan kos:

(1) Fakta adalah bertentangan di mana antara tempoh 12 Januari 2001 hingga 2010, defendan telah membuat bayaran kepada plaintif berjumlah RM1,380,160.97. Walau bagaimanapun saksi plaintif ('SP2') tidak merujuk semula dengan mana-mana butiran invois berkaitan setiap bayaran yang telah dibuat. Dia juga tidak merujuk dalam keterangannya kepada semua invois yang telah dikeluarkan oleh plaintif kepada defendan dan tidak memberi keterangan berhubung jumlah keseluruhan yang diinvoiskan berdasarkan invois-invois yang dikeluarkan kepada defendan. Adalah penting untuk plaintif menunjukkan bahawa kesemua invois tersebut yang dikeluarkan kepada defendan bagi tempoh yang dipersoalkan, bukan hanya enam invois yang diplikan dalam penyataan tuntutan; dan juga menunjukkan keseluruhan jumlah yang diinvoiskan dan baki tertunggak selepas mengambil kira bayaran-bayaran yang dibuat oleh defendan (lihat perenggan 21).

(2) Keterangan SP2 berhubung jumlah yang dikatakan masih terhutang kepada plaintif oleh defendan adalah berdasarkan dokumen satu muka surat yang dikatakan adalah penyata akaun yang dikeluarkan oleh plaintif kepada defendan. Tiada butiran transaksi atau butiran invois. Pembuat tidak dipanggil untuk menjelaskan bagaimana mendapat jumlah RM146,522.77 dan bahawa penyata akaun juga tidak ditandatangani (lihat perenggan 23).

(3) Penyataan tuntutan plaintif memohon untuk jumlah RM383,557.27 sebagai jumlah yang terhutang oleh defendan sehingga 31 Julai 2011. Jumlah ini terdiri daripada jumlah utama RM146,552.77 dan faedah bayaran lewat berjumlah RM237,034.50. Walau bagaimanapun di perenggan 8 dalam penyataan tuntutan, berkenaan pengiraan faedah bayaran lewat, ia dinyatakan bahawa jumlah utama yang tertunggak adalah RM131,196.63 dan bukan RM146,552.77. Dalam keadaan berikut, penjelasan yang wajar daripada pembuat penyata akaun itu berhubung bagaimana jumlah RM146,552.77 diperoleh amat penting dan relevan. Namun begitu tiada keterangan sedemikian (lihat perenggan 23).

(4) Dalam menggunakan budi bicara kehakimannya untuk campur tangan dengan penemuan fakta mahkamah perbicaraan, mahkamah rayuan membuat perbezaan antara kes di mana penemuan fakta spesifik bergantung kepada kebolehpercayaan saksi-saksi dan kes yang bergantung kepada inferens yang diperoleh daripada fakta lain. Mahkamah rayuan bersedia untuk campur tangan dalam kes terkemudian dan membentuk pandapatnya sendiri berdasarkan fakta-fakta tersebut daripada kes terdahulu itu (lihat perenggan 28).

(5) Penghayatan kehakiman yang wajar berhubung keterangan bermaksud bahawa hakim perbicaraan telah mempertimbangkan setiap keterangan penting yang dikemukakan di hadapannya dan telah menguji keterangan itu dengan keterangan dokumentar sedia ada yang menyokong keterangan lisan saksi-saksi dan memberi sebab kerana menerima atau menolak keterangan-keterangan tersebut (lihat perenggan 31).

(6) Hakim yang bijaksana membuat penemuannya berdasarkan hampir keseluruhan keterangan SP2. Walau bagaimanapun, beliau tidak memberikan apa-apa sebab kenapa beliau menyebelahi keterangan plaintif (khususnya keterangan SP2) berbanding keterangan defendan. Hakim yang bijaksana tidak membuat apa-apa penemuan berhubung kebolehpercayaan DW1 atau bahawa DW1 bukan seorang saksi yang jujur atau boleh dipercayai. Oleh itu, penemuan-penemuan oleh hakim yang bijaksana tidak memuaskan kerana tiada penghayatan kehakiman yang wajar berhubung keterangan oleh beliau dalam mempertimbangkan fakta-fakta (lihat perenggan 32).]

Notes

For cases on damages, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3206–3251.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1279–1313.

Cases referred to

Azman bin Mahmood & Anor v SJ Securities Sdn Bhd [2012] 6 MLJ 1; [2012] 6 CLJ 573, FC (folld)

Benmax v Austin Motor Co Ltd [1955] 1 All ER 326, HL (refd)

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (folld)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627; [1994] 3 CLJ 1, SC (refd)

Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 3 AMR 2430, CA (distd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd)

UEM Group Bhd v Genesis Intergrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785, FC (folld)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)

Appeal from: Writ Summons No 22NCVC-409–04 of 2012 (High Court, Kuala Lumpur)

Devan a/l Narayanan Raman (Devan & Associates) for the appellant.
Zaidah Ibrahimi Husaimi (Ho & Co) for the respondent.

Abdul Aziz Abdul Rahim JCA:

INTRODUCTION

[1] This is the appellant's appeal against the judgment of the High Court given after full trial.

[2] As the amount of the judgment was only RM146,522.77, the appellant applied for and had obtained leave on 25 January 2013 to file this appeal from the Court of Appeal.

[3] The appellant was the defendant and the respondent was the plaintiff respectively before the High Court below. For easy reference, in this judgment the appellant will be referred to as the defendant and the respondent as the

plaintiff, as they were before the High Court.

THE PLEADED FACTS

[4] The plaintiff had pleaded, as their claim, that a sum amounting to RM383,557.27 was the balance owing from the sale of timber products (inclusive of late interest of 1.5% a month as at 31 July 2011) which was sold and delivered by the plaintiff to the defendant. At para 6 of the statement of claim, the plaintiff stated that the principal sum outstanding was RM146,522.77 based on the following six invoices:

Date	Invoice No	Principle Amount (RM)
5 March 2002	2173	13,522.77 (balance of invoice value RM20,100)
5 March 2002	2174	1,000
4 April 2002	2200	63,000
4April 2002	2201	3,000
24 May 2002	2301	63,000
24 May 2002	2302	3,000
Amount of principal debt	146,522.77	

[5] The defendant denies the amount owing and also pleaded that the defendant had paid the plaintiff RM663,071 for work done, and also the contra of a semi-D house had settled a further sum of RM131,494.97 to the plaintiff, so there is no amount due and owing. The defendant had also stated that the plaintiff did not sell timber product as pleaded but instead the plaintiff was to install and built roof trusses on buildings in a construction project; and because of defective work the defendant was entitled to deduct the sum of RM57,075 from the amount due to the plaintiff.

[6] The plaintiff in their pleadings has never stated the total value of goods supplied to the defendant and the plaintiff never pleaded the payments made by the defendant for the periods 2001–2007. The plaintiff only pleaded that there were monies owing on six invoices issued within the period of 5 March 2002–24 May 2002 which amounts to RM146,522.77.

FINDINGS BY THE HIGH COURT

[7] At the trial, it was proven that the defendant was a main contractor in a construction project and the plaintiff was appointed to install roof trusses for

the buildings being built, so it is not a simple sale transaction as pleaded by the plaintiff in the statement of claim but an agreement to design supply and install roof trusses on buildings.

[8] As to the amount claimed and owing, the learned judge in his grounds of judgment stated as follows:

> As regards the principal sum of RM146,522.77, the plaintiff's claims that that this sum is owing and due; the defendant's defence is that it has paid a total of RM663,071. This may be so but it does not detract from the cogent and credible evidence produced by the plaintiff that inspite of payments made by the defendant, there is still an outstanding amount of RM146,522.77 owing and due. I accept the plaintiff's evidence over that of the defendant and it is therefore my conclusion that it is more probable than not that the defendant still owes the plaintiff the sum of RM146,522.77.

The learned judge also found that the plaintiff is not entitled to claim interest at the rate of 1.5% per month on the principal sum of RM146,522.77. The reason given for this finding is that there were two quotations for the nature and scope of works to be done given by the plaintiff to the defendant. Both quotations were referred to by the learned judge in his judgment and he found that the first quotation which contained cl 7.3 on interest chargeable on all overdue account was not accepted by the defendant. But the learned judge found that the second quotation was signed by both the plaintiff and the defendant and contained no such clause. However there is no issue in this appeal on the plaintiff's claim for interest as there is no cross-appeal by the plaintiff.

THIS APPEAL

[9] The defendant submitted that the learned judge was in error because the plaintiff never produced any cogent and credible evidence that in spite of payments made there is an amount outstanding of RM146,522.77. The burden is on the plaintiff to prove the amount outstanding.

[10] The defendant further submitted that it had made payments; and proof of payments can be seen in the payment vouchers at pp 121–152 of the record of appeal Vol 2(1) part B and C.

[11] SP2 Tan Sew Ing and SP1 Ho Chee En have never given evidence on what was the total value of the invoices issued by the respondent to the appellant. Therefore, there is no proof at all that after taking into account the payments made, there is any sum outstanding.

[12] SP2 did, in Q4 of her witness statement, refer to a one page document

which was the statement of account which has only one entry which is the purported balance. The statement of account does not have any transaction details or invoice details, it just states *'Balance B/F amount RM146,522.77'*.

[13] Therefore, the defendant urged upon us to set aside the findings and judgment of the High Court on the ground that the learned judge had erred on facts and law in not giving a proper judicial appreciation of the evidence particularly that of SP2 that was adduced before him.

[14] In response to the submissions by the defendant before us, the plaintiff submitted that the credibility of SP2 was never challenged during cross-examination. It was submitted that though SP2 only started to work for the plaintiff in 2008, SP2 had testified that the plaintiff had maintained one continuous account for the defendant. Therefore it was argued that the date SP2 commenced work with the plaintiff is irrelevant. Learned counsel for the plaintiff cited the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 to support the proposition that as a general rule that a failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[15] It was also submitted for the plaintiff that SP2 in her evidence-in-chief (by way of witness statement) had explained the amount claimed by the plaintiff and had referred to the plaintiff's statement of account which shows that the amount owing by the defendant and the part payments made.

[16] Regarding the part payments by the defendant, learned counsel for the plaintiff submitted that these had been taken into account because the defendant's account with the plaintiff was a continuous account and the account shows that after taking into consideration all the payments made by the defendant, the defendant still owes the plaintiff a total sum of RM146,522.77. It was argued that the defendant also had not stated specifically which payment that was made that had not been accounted for by the plaintiff.

[17] Next, it was submitted for the plaintiff that in this case the High Court had made a finding of fact that the defendant was indebted to the plaintiff for the sum of RM146,522.77. Therefore it was urged on us that this finding of fact should not be disturbed. To support this submission learned counsel for the plaintiff cited the case of *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309.

[18] Lastly, learned counsel for the plaintiff submitted that the debit note which the defendant said was sent to the plaintiff was never received by the plaintiff. In any event it was argued that the debit note was a self-serving

document produced by the defendant and of little evidential value.

OUR OPINIONS AND FINDINGS

[19] There is only one issue in this appeal. That is whether there is sufficient or cogent evidence to support the finding of fact by the learned trial judge or, to put it in another way, whether the learned judge had given or made a proper judicial appreciation of the evidence adduced before the court. Learned counsel for the defendant submitted that the learned trial judge had failed to make a proper judicial appreciation of the evidence that was before him and that there is no evidence to support the learned judge's finding of fact that the defendant still owes the plaintiff's money in the sum of RM146,522.77. It was urged upon us that this appeal is a fit and proper appeal for the Court of Appeal to exercise its powers to set aside the judgment given as, based on the grounds of judgment, the learned judge had failed to consider crucial evidence which was in favour of the appellant.

[20] The principles for appellate interference in the decision of the trial court was stated by the Federal Court in *Azman bin Mahmood & Anor v SJ Securities Sdn Bhd* [2012] 6 MLJ 1; [2012] 6 CLJ 573 where it was held:

> The law on appellate intervention on findings of fact by a trial judge is trite. In this context it may be useful to refer to the case of *Multar Masngud v Lim Kim Chet and Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237 (FC), wherein it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded. In the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 1 LNS 40 it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice.

[21] Applying the above principles to the facts of the case in the present appeal, we agree with the submission by learned counsel for the defendant. It is uncontroverted fact that between the period of 12 January 2001–2010, the defendant had made payment to the plaintiff totaling RM1,380,160.97. This is the evidence of SP2 one Tan Sew Ing who was the account officer for the plaintiff then. In her witness statement marked KS-SP2, at paras QA8 to QA12, SP2 referred to part payments made by the defendant between 2001 and 2010 totaling RM1,380,160.97. However she did not cross-refer to any particular invoice in respect of each of the payment made. She neither referred in her evidence to all the invoices that were issued by the plaintiff to the defendant nor did she testified as to the total amount invoiced (inclusive of the

amount invoiced in the six invoices that were pleaded) from the invoices issued to the defendant. In our view it is incumbent on the plaintiff to show all the invoices that were issued to the defendant for the period in questions, not merely the six invoices that were pleaded in the statement of claim; and also to show the total amount invoiced and the balance outstanding after taking into consideration the payments made by the defendant. In this regard it is pertinent to note that (and this fact is not disputed) the dealings and transactions between the plaintiff and the defendant is evidenced by one continuous account. Therefore it should not be a difficulty for the plaintiff to list all the invoices that had been issued to the defendant and to identify which invoice has not been paid or which had been paid but only partially.

[22] We accept the submission that the burden is on the plaintiff to prove its claim. Earlier we have said that the defendant had made payments and proof of payments are the payment vouchers tendered in evidence. These payments vouchers are for payment made between the year of 2006 until Jun 2010. Some of the payment vouchers (for example payment voucher dated 27 June 2008 and payment voucher dated 26 June 2009) are for final payments and on all the payment vouchers it was stated what the payment was for.

[23] It is not insignificant that SP2 started working for the plaintiff only in 2008. The transactions in question went as far back as 2001. Though SP2 in her evidence had said that her testimony on the account was based on the plaintiff's record to which she had access and control as the plaintiff's account officer, in our opinion, she would not be able to tell whether the record of account between 2001 and 2008 had been properly maintained and all entries were accurately made. In any event, there is no evidence by PW2 to show that the accounts had been properly maintained. SP2's evidence as to the amount alleged still owing to the plaintiff by the defendant is based on a one-page document which is said to be the statement of account issued by the plaintiff to the defendant. It was dated 31 February 2010. This document contains only one entry — that is 'BALANCE B/F … RM146,522.77'. There is no transaction details or invoice details. The case of *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611 was referred to us by learned counsel for the defendant for the legal proposition that the production of the statement of account per se or by itself is not evidence of amount owing. The amount outstanding stated in the statement of account must be proved as a matter of fact of the sum owing. In *Sony Electronics (M) Sdn Bhd*'s case, the court referred to a decision of the then Supreme Court in *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1 where it was said that 'the mere fact that a summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover the record book upon which the maker based her

summary must be in evidence …'. It is observed that in respect of the statement of account produced by the plaintiff in the present appeal, the maker was not called to explain how the sum of RM146,552.77 was arrived at and that the statement of account was also not signed. In this respect it is worth noting that in the plaintiff's statement of claim the plaintiff had prayed for the sum of RM383,557.27 as the amount owing by the defendant as of 31 July 2011. This figure comprises of the principal sum of RM146,552.77 for goods and services delivered between 5 March 2002 and 24 May 2002 (as pleaded in para 6 of the statement of claim) and late payment interest totaling RM237,034.50. It is also observed that in para 6 of the statement of claim the pleaded fact is that the principal sum of RM146,552.77 was all from the invoices issued in May 2002 which were partially paid or totally unpaid. However at para 8 of the statement of claim, with regard to the calculation of late payment interest, it was stated that the principal sum outstanding was RM139,196.63 not RM146,552.77. It is obvious from the same para 8 of the statement of claim that the sum of RM146,552.77 was actually made up of the principal RM139,196.63 plus the 5% of the retaining sum on the said principal which amounts to RM7,326.14. In the circumstances therefore, a proper explanation by the maker of the statement of account as to how the figure RM146,552.77 was obtained is of great importance and relevance. Unfortunately there is no such evidence.

[24] In his submissions before us, learned counsel for the defendant pointed to the fact that the respondent produced only one statement of account for January 2001 and some for 2010. But statements for February 2001 to February 2010 were not there and the statements in 2010 were lacking in details as to the transactions. Learned counsel for the defendant further submitted that the defendant never received the computer print outs which the plaintiff alleged, were sent to the defendant and that there was no explanation to these print outs as to their accuracy and veracity. The defendant also had challenged the six invoices pleaded by the plaintiff stating that the work was never done. It was submitted that the plaintiff had not produced any proof of the allegedly completed works for which the defendant was invoiced. It was argued for the defendant that the plaintiff had issued a quotation for works to be done on semi-detached houses at the rate of RM8,600 per unit. The quotation was dated 1 December 2000 and it was accepted by the defendant. This quotation was issued by Pan Malaysian Timber Products Sdn Bhd which was the former name for the plaintiff. However, the plaintiff had issued two invoices (Invoice No 2173 dated 5 March 2003 for the sum of RM20,100 and Invoice No 2174 for the sum of RM500 for two units of semi-detached house) for a sum totaling RM21,100. This amount works out to RM10,550 per unit of semi-detached house which is higher than the quoted price accepted by the defendant. There is no explanation for this difference in amount.

[25] As for the debit notes, the defendant submitted that these were for the

defects in the works which were brought to the attention of the plaintiff and which the plaintiff had not remedied, thus forcing the defendant to engage a third party for the remedial works. SD1 in his sworn evidence of his witness statement marked as KS-SD1 said that the debit notes were prepared on his instruction and these debit notes were then given directly to the plaintiff's director one Mr Goh Yew Guan, mostly by SD1 himself, and where the sum is too small, by the defendant's staff instructed by SD1. According to SD1 the plaintiff never objected to these debit notes.

[26] We have carefully perused the judgment of the learned judge, and we find that he had not considered this evidence by DW1. As submitted by learned counsel for the defendant the learned judge did not give any reason for not accepting or rejecting the evidence of DW1 when there is clear evidence by the plaintiff's own witness SP1 that DW1 was dealing with one Mr Goh Yew Guan who represented the plaintiff in the dealing between the parties. Learned counsel for the defendant submitted that Mr Goh Yew Guan is still in the employment of the plaintiff, yet he was not called to testify regarding the debit notes. This fact was never denied by the plaintiff either in evidence or in the submissions.

[27] In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA) it was said that 'it is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion'.

[28] In exercising its judicial discretion to interfere with the finding of fact by a trial court, the appellate court draws the distinction between a case where the finding of a specific fact depends upon the credibility of witnesses and one which depends upon inference drawn from other facts. The appellate court would readily interfere in the latter case and form its own opinion on those facts than in the case of the former — *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517. And it was said by House of Lords in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 at p 329 that 'where there is no question of the credibility or reliability of any witness, and in cases where the point of dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, give weight to his opinion.'

[29] In another case, *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 at p 177, the late HT Ong CJ (Malaya) said in a dissenting judgment, that the appellate court is in as good a position as the trial judge to draw its own conclusions from the primary undisputed fact and that though the trial judge had seen and heard the witnesses and had been impressed by the demeanour of certain witnesses, the appellate court has still the obligation to scrutinise the evidence.

[30] However, to warrant an appellate court intervention, the appellate court must be convinced that there was no judicial appreciation of evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case taken as whole — *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 3 AMR 2430.

[31] A proper judicial appreciation of evidence would mean, in our view, that the trial judge had considered every piece of material evidence adduced before him or her and had tested this evidence against contemporaneous documentary evidence supporting the oral evidence of the witnesses and gave reasons for accepting or rejecting them. We find support for this proposition in the Federal Court's case of *UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785. The case turns on the issue of finding and inference of facts by the trial judge and the credibility of a material witness which findings were overturned by the Court of Appeal. Several questions were posed to the Federal Court to decide on the issue; and the views expressed by the Federal Court on the issue can be seen from the following three passages from the judgment of the court:

> [29] It can be seen from the above that the trial judge's conclusion as to Seow's credibility was based on his observation not only on material attributes of Seow's demeanour but also on evident contradictions and inconsistencies on the relevant and material matters. The trial judge referred to specific examples of Seow's contradictions and inconsistencies. These examples were drawn from the different aspect of the case before him and threaded through the various heads of oppression identified by UEM in its case. To that end, the trial judge noted that Seow had lied on affidavit as well as during his oral evidence and was untruthful.
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> [30] In the light of the above, it is apparent that this is a case where the findings of credibility could not be severed from documentary evidence. The finding by the trial judge that Seow was being untruthful was an integral part of the whole case on the basis of a reasonable and proper judicial appreciation of the evidence. This is evident from a reading of the trial judge's judgment as a whole as well as his summary and conclusions. The trial judge had come to findings of specific facts, pertaining to the heads of oppression in the UEM's petition in rejecting the version put forth by Seow.
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> [31] The Court of Appeal, on the other hand despite not having addressed the trial judge's conclusion that Seow was not a witness of truth nor itself finding that the trial judge's conclusion in that regard was erroneous, proceeded to reverse the

findings of the trial judge on the alleged oppression of GIE by referring only to specific documents. This was where the Court of Appeal had gone wrong. It had failed to recognize the significance of Seow's evidence to its case in response to UEM petition. It had also fallen into error in viewing the documents selectively and had in fact indirectly reinstated Seow as a credible witness, without assigning any reason for doing so.

[32] To return to the present appeal, the learned judge had based his findings almost wholly on the evidence of SP2. This is obvious from para 19 of his judgment quoted earlier in this judgment. However, he had not given any reasons as to why he preferred the evidence of the plaintiff (in particular that of SP2) to the evidence of the defendant. In this regard it is noteworthy that the learned judge did not make any finding as to the credibility of DW1 or that DW1 is not a truthful witness or unreliable. In our view therefore, the findings by the learned judge in this case is unsatisfactory as there has been no proper judicial appreciation of evidence by him as the trier of facts.

[33] For the above reasons, we allowed the appeal with agreed cost of RM10,000 here and below to the defendant/appellant and set aside the order of the High Court. The deposit is refunded.

Appeal allowed with costs.

Reported by Kanesh Sundrum